

Whether claimant suffered a work-related injury is a jurisdictional issue that subjects a preliminary hearing order to Appeals Board review. See K.S.A. 44-534a, as amended.

Claimant requested preliminary hearing benefits of temporary total disability compensation; past and future medical treatment for a low back injury she alleged occurred while working for the respondent. Respondent argues that claimant's current need for those preliminary hearing benefits are not associated with her work for the respondent but are the result of work activities claimant performed at Burger King, a subsequent employer. The Administrative Law Judge agreed with the respondent's argument and denied claimant's request for preliminary hearing benefits. The Appeals Board has reviewed the preliminary hearing record that contains claimant's testimony and her medical treatment records admitted into evidence and finds that the Administrative Law Judge's Order Denying Compensation should be affirmed.

Claimant suffered a lumbar strain on February 28, 1997, when she picked up a tub of heavy dishes while working as a waitress for the respondent. The following day, claimant notified the respondent of her low back injury. Respondent initially sent claimant for medical treatment to the Abilene Memorial Hospital. The hospital then referred claimant to a local physician, D.C. Roabaugh, M.D., for examination and treatment.

Dr. Roabaugh saw claimant on March 3, 1997, and diagnosed lumbar strain with muscle spasm. The claimant was taken off work, given pain medication, and placed in a physical therapy program. Claimant's low back condition improved under this regimen of conservative treatment. Dr. Roabaugh released claimant on March 11, 1997, to return to work March 12, 1997, with temporary restrictions of no repetitive lifting and no lifting over 25 pounds.

Claimant did not return to work for respondent. However, she started working as a cashier for Burger King on March 12, 1997. Claimant testified that the Burger King job required her to take orders, serve food, and wipe down tables. Claimant also testified she remained asymptomatic while performing those duties unless she had to work long hours.

Claimant returned to see Dr. Roabaugh on March 25, 1997. Dr. Roabaugh's medical note of March 25, 1997, indicates claimant was much improved with no significant pain and she told the doctor she was feeling well. The doctor's examination reveals that claimant walked without a limp and had full range of motion with minimal tenderness. Dr. Roabaugh discharged claimant from his care with no disability, noting that the lumbar strain was resolved.

On March 31, 1997, claimant returned to see Dr. Roabaugh complaining of increased pain in her right lower back. The doctor noticed that claimant described her job as basically standing and taking orders, but that day she was required to scrub tables and empty ice into a machine. At the preliminary hearing, claimant testified she had to lift the ice buckets shoulder-high to fill the machine.

Because of claimant's on-going low back symptoms, Dr. Roabaugh referred claimant to Dan E. Wilson, Jr., D.O., a physical medicine and rehabilitation physician in

Salina, Kansas. Dr. Wilson examined claimant on April 23, 1997, and found, among other symptoms, that claimant was in some distress because of her back pain and she walked with a very antalgic gait while favoring her right lower extremity. Claimant also complained of sharp central lower lumbar pain which radiated into her right buttock and down her right leg to her foot. Dr. Wilson's impression was low back pain, some related to lumbar strain and some related to right sacroiliac strain. He ordered an MRI, a Medrol Dosepak, and had her remain off work.

Claimant argues that the work activities she performed at Burger King did not permanently aggravate her low back injury she sustained while working for the respondent. Claimant further argues that if there was an aggravation, such aggravation was only temporary and not permanent. Claimant points to her testimony that her low back pain remained in the same area as the pain she suffered following the injury while working for the respondent. Furthermore, even after her pain increased while working for Burger King, the pain returned to the same level as it was following the February 28, 1997, accident while employed by the respondent. Therefore, claimant contends all of her current symptoms and need for medical treatment are associated with the February 28, 1997, low back injury she suffered while employed by the respondent.

The Appeals Board concludes that claimant's medical treatment records entered into evidence at the preliminary hearing support the Administrative Law Judge's decision that it is more probably true than not that claimant's current low back symptoms and need for medical treatment were the result of her work activities at Burger King and permanently aggravated and accelerated her preexisting low back injury. Specifically, when Dr. Roabaugh released the claimant on March 25, 1997, he did so without permanent restrictions or disability, noting that claimant's lumbar strain had resolved. At that time, claimant was working for Burger King and testified that her low back injury would only become symptomatic after working long hours. Claimant returned to see Dr. Roabaugh on March 31, 1997, with complaints of pain in her right lower back after working that day for Burger King doing scrubbing and emptying ice buckets into a machine.

Dr. Wilson's examination of claimant on April 23, 1997, is further evidence that claimant's low back condition worsened after she was employed by Burger King. The doctor observed claimant walking with a very antalgic gait, and had some distress related to her pain. She also complained of sharp pain in the lumbar area radiating down her right buttock and down her right leg to the foot. This is quite in contrast to Dr. Roabaugh's findings when he released claimant to return to work with no restrictions on March 25, 1997. At that time, claimant had no significant pain, stated she was feeling well, and only had minimal tenderness near the right sacroiliac joint.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict, dated July 24, 1997, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September.

BOARD MEMBER

c: James B. Biggs, Topeka, Kansas
James M. McVay, Great Bend, Kansas
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director